IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 104.

MARYLAND STEEL COMPANY OF BALTIMORE COUNTY,
Appellant,

v.

THE UNITED STATES.

BRIEF ON BEHALF OF APPELLANT.

ALEXANDER PRESTON,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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THE CASE.

This is an appeal from the Court of Claims.

The petition of the Maryland Steel Company, of Baltimore County, claimant below, appellant here, alleged:

That on February 24, 1908, the appellant entered into a contract with the United States, made a part of the petition herein, by the terms of which the claimant agreed to build one steel hull twin-screw suction dredge and furnish and install therein the propelling machinery, pumping machinery, electric light plant, and all other machinery and other parts required to be installed for the consideration of $357,500, said work when completed to be delivered to the defendants at Sparrows Point, in the State of Maryland, which work was completed and accepted by the United States on January 6, 1909. That the claimant did furnish the necessary labor and material and did build, furnish and install said hull, and machinery and plant, and did all the claimant had agreed to do under the terms and as required by said contract. All of which labor, material, work and construction were duly accepted by the defendants on the 6th of January, 1909, and that thereupon the claimant became and was entitled to receive the money due therefor.

That the United States, from time to time, paid the claimant as required by the terms of said contract, with the exception of $4,750, which amount was then due and owing to the claimant from the defendants, exclusive of all setoffs and just grounds of defense, with interest thereon from the 4th day of November, 1908. The petition contained also the necessary averments that there had been no action on the claim set forth by Congress, but it had been disallowed by the auditor of the War Department; that the claim-

ant was the sole owner of said claim and solely interested therein, no assignment or transfer of said claim or any part thereof nor interest had been made. The said claimant was justly entitled to the amount therein claimed from the United States as allowed over all just credits and setoffs, and that the claimant had at all times borne true allegiance to the United States, and had not in any way voluntarily aided or abetted or given encouragement to rebellion against the United States. (R., 1-3.)

The defendants answered and filed a cross petition wherein they admitted the contract as above set forth and that from the full amount thereof they had deducted $4,750 which they claimed as a setoff from the amount otherwise due the claimant under the contract sued on because of the following: That theretofore a written contract had been entered into by and between the appellant and the United States for the construction of a single-screw steamer. That by the terms of said contract the steamer was to be delivered to the Government on the 9th day of December, 1903, but that the Maryland Steel Company failed to complete and deliver said steamer until April 1, 1904; being 95 days after the expiration of the contract period, exclusive of Sundays and holidays. That the contract for the construction and delivery of said steamer contained the following provision as to liquidated damages: "That the Maryland Steel Company shall complete the construction and equipment of the said steamer and deliver same to the party of the first part in New York harbor, or as di-

rected by him, in one hundred forty (140) days, exclusive of Sundays and legal holidays, from the date of this contract. And it is hereby agreed that in case the party of the second part fails to complete in all respects and deliver the said steamer within the time herein specified, the loss resulting to the United States from such failure is hereby fixed at the rate of fifty ($50) dollars per day for each and every day, exclusive of Sundays and legal holidays, completion and delivery of the vessel is delayed beyond the period hereinbefore specified, and it is hereby stipulated that the party of the first part may withhold such amount as liquidated damages from any money due and payable to the party of the second part by the United States for work done under this contract. In the event of the act of God, war, fire, or strikes and lockouts of workmen affecting the working of this contract, the date of completion of the steamer may be extended for such period as may be deemed just and reasonable by the party of the first part, to cover the time lost from any of the abovementioned causes."

That the Maryland Steel Company failed to deliver said steamer until 95 days beyond the contract date, which delay was wholly the fault of the Maryland Steel Company, and was to no extent whatever the fault of the Government. That by virtue of said delay on the part of the claimant there was justly due the Government $50.00 as agreed liquidated damages for each of the 95 days beyond said contract date, amounting in all to the sum of $4,750. That in-

advertently and by mistake of fact the officers of the Government having direct charge of said payment paid the whole amount of the contract price for the construction and delivery of said steamer to the claimant, and failed to deduct therefrom the said sum of $4,750, so fixed as liquidated damages in said contract. That the said overpayment was due wholly to the mistake on the part of the officer paying the same, and was not binding upon the United States, and that the said sum of $4,750 so inadvertently, improperly and illegally paid by the Government to the Maryland Steel Company, was then due from said company to the Government. That demand had been made upon said Maryland Steel Company for the repayment of said sum, which demand had been refused.

That defendants then claimed as a setoff to the amount otherwise due on the contract sued on by the claimant in the case, that said amount of $4,750 so paid to the Maryland Steel Company, under the contract for the steamer should be set off and allowed as against the payment of said $4,750 so retained by the Government under the contract sued on in the claimant's petition, for which the defendants demanded judgment. (R., 81-82.)

For answer to said setoff, by way of replication, the appellant set up that before the expiration of the time as provided in the contract for the delivery of the steamer, on the first day of December, 1903, the proper officer and agent of the defendants under that contract, the Quartermaster-General of the Army

had waived the limit of time within which said steamer was to be completed and that the steamer was subsequently completed and the contract price paid therefor. (R., 83.)

The case was heard on the pleadings and proofs, and on December 2, 1912, the court dismissed the petition.

The court found as facts that the contract for the building of the steamer as set forth in the petition was properly executed and approved. That by the terms of said contract it was provided that if the claimant should fail to complete and deliver said steamer within the stipulated time it would pay the United States the sum of $50.00 per day as liquidated damages for each and every day so delayed, exclusive of Sundays and legal holidays, which amount it was provided might be withheld from any money due to the claimant under that contract. (R., 84.)

That on December 1, 1903, before the time stipulated for the completion had expired, and at the request of the claimant owing to unavoidable delays in securing the necessary material, the Quartermaster-General, in his discretion under the contract, orally waived the time limit in said contract for the construction and equipment of said steamer, and subsequently on April 2, 1904, by letter, confirmed such waiver. (In finding of fact IV this letter is said to have been written to the "Quartermaster-General." This is a typographical error for "depot quartermaster," as will be admitted in the appellees' brief.) That the steamer so constructed was completed, de-

livered, and accepted by the United States on April 1, 1904, or 95 days, exclusive of Sundays and legal holidays, after the time fixed in the contract therefor, and on April 13, 1904, the Quartermaster-General of the Army directed the depot quartermaster at New York to make final payment on said steamer, retaining, however, 10 per cent to make good any defects that might appear in either the material or workmanship, and that thereafter, July 13, 1904, the entire sum stipulated to be paid by the defendants was paid without any deduction whatever. (R., 84-85.)

That it did not appear that the claimant below had unreasonably delayed the work after the waiver of time by the aforesaid. (R., 85.)

The Court also found as a fact that it was not shown that the United States suffered any actual pecuniary loss or damage by reason of the delay of the claimant in the completion and delivery of the steamer. (R., 85.)

That thereafter, on February 24, 1908, the claimant entered into another contract with the United States, made a part of the petition herein, by the terms of which the claimant agreed to build the twin-screw suction dredge as above set forth for the consideration of $357,500 to be delivered to the United States at Sparrows Point, Maryland, which was completed and accepted by the United States on January 6, 1909, and that the claimant was paid therefor the stipulated price, less $4,750, which the defendants claimed was the amount arising as liquidated dam-

ages for the 95 days' delay of the claimant in the completion of the steamer under the first contract and which amount the defendants *claimed* was inadvertently and under a mistake of fact paid to the claimant.

Assignment of Errors.

The Court below erred:

1. In dismissing the claimant's petition.

2. In holding that the waiver of the time limit from which liquidated damages were to be calculated did not toll the provision for liquidated damages.

3. In holding that the payment of the entire balance due under the contract for the steamer did not waive any claim for liquidated damages.

4. In holding in the absence of any proof that the payment of the entire contract price for the steamer was money paid under a mistake of fact or illegally paid.

5. In holding under the provisions of the contract for the building of the steamer that the finding (VI), that no actual pecuniary loss or damage to the United States had been shown, was not a complete defense to the claim for liquidated damages.

POINTS AND ARGUMENT.

I

Within the time limited for the completion and delivery of the steamer under the first contract the Government waived the time limit.

The time provided for the completion and delivery of the vessel under this contract would have expired on December 9, 1903. On the first of that month, however, the Quartermaster-General, the contract being made with his Department, orally waived the time limit. On April 2, 1904, he confirmed the oral waiver in a letter to the depot quartermaster who was to make the payments under the contract. And as the liquidated damages under the contract were to accrue only from the time limited for the completion of the steamer a waiver of the time limit was a waiver of the liquidated damages.

It is well settled that in such cases the waiver may be oral and is not required to be in writing. We are well aware of the fact that the act of June 2, 1862, requires contracts for military supplies to be in writing, but a waiver of a time limit in such a contract does not constitute a new contract.

The case of Salomon v. United States is conclusive on this point. Salomon entered into a written contract with the Quartermaster's Department to deliver at Fort Fillmore 12,000 bushels of corn at such times and in such quantities, of not less than 1,000 bushels per month, as the assistant quartermaster

should direct, 9,000 before January 1 and the whole amount by the 1st of May, 1865. The 9,000 bushels were delivered and paid for before the 1st of May, and about this there was no dispute. Salomon delivered the remainder of the corn at Fort Fillmore on October 15, 1865, by depositing it in the military storehouse at that place. The chief quartermaster's clerk afterwards examined this corn, weighed some of the sacks, counted the remainder, and gave to Salomon a receipt for the amount, stating that that completed his contract. The clerk then and there took actual possession of the corn and the chief quartermaster gave to Salomon the usual voucher for the sum due. The corn was sound when delivered, but was injured by the defective and leaky condition of the storehouse.

The Government declining to pay the amount of the voucher, Salomon filed a petition in the Court of Claims for payment. That Court decreed that he should be paid for a part of what he had finally delivered and which the Government had used, but not for the residue which had proved unserviceable and been lost by decay arising from the defective and leaky condition of the storehouse. Salomon appealed to this Court.

Said the Court by Mr. Justice Miller:

> "Whether we regard the delivery made in October as made under a verbal extension of the time stipulated in the original contract, or consider it as a new transaction in which the Government received and took possession of the corn

and used part of it and permitted the remainder to be injured in its hands, we think the claimant is equally entitled to be paid for it.

"The act of 1862 (12 Stat., 411) requiring contracts for military supplies to be in writing is not infringed by the proper officer having charge of such matter accepting the delivery of such supplies after the day stipulated, nor is a verbal agreement to extend the time of performance invalid."

Salomon v. U. S., 19 Wall., 17, 19, 20.

This case really lays down a much broader rule than the one for which we are contending. We need not here go into the effect of acceptance after the time stipulated for delivery under a contract, for in the case at bar the Government actually—not by implication but actually—waived the time limit for the performance of the contract within the time provided for and before there was any default.

Where a contract to do certain work of repair and improvement on a canal required the work to be finished by the 31st of May, 1876, and on the 23rd of May, 1876, the chief of engineers ordered that the time specified for the completion of the work to be extended to the 1st of October, 1876, and by a similar order it was further extended to the 15th of December, 1876, the claimant recovered in the Court of Claims.

Ford v. U. S., 17 C. Cl., 60.

In that case there was no pretension that the provisions of the act of June 2, 1862, were complied

with. In other words, there was merely an extension of time under an existing contract, and not a new contract.

See also D. C. v. Camden Iron Works, 181 U. S., 453, a case originating in the District of Columbia where the act of June 11, 1878, required contracts to be in writing, signed by the Commissioners, copied into a book for the purpose, and so forth. The contract provided for the manufacture of certain designated sizes of iron pipe and its complete delivery to the District of Columbia within 136 days after the date of the execution of the contract. There was a provision that for failure to complete the work at the time specified, there should be deducted from the money to become due under the contract one per centum per week day on the value of each article overdue and undelivered, and the sum of $10 per diem for the delay, estimated as liquidated and fixed damages to the District. The pipe should have been wholly delivered by November 10, 1887. But a small proportion of the pipe was delivered prior to November 30, 1887, but after that date pipe worth $11,404.09 at the contract rates was delivered to and accepted by the District of Columbia and used by the corporation. The total value, at contract rates, of all the pipe delivered to and accepted by the District was $16,335.87, on which there had been paid $5,291.71. The Camden Iron Works sued to recover the difference. The District claimed that this was more than counterbalanced by the fines and penalties charged

up by the defendant for non-delivery of the pipes within the time specified in the contract.

The Supreme Court, affirming the judgment of the Court of Appeals of the District of Columbia, held the acceptance of the pipe after the time specified in the contract not to constitute a new contract but to be a mere waiver of further performance.

D. C. v. Camden Iron Works, 181 U. S., 453.
Phillips Const. Co. v. Seymour, 91 U. S., 646.
Williams v. Bank, 2 Pet., 96.

The facts in the case at bar are somewhat similar to those of Ittner's case in the Court of Claims. There the claimant agreed in writing with the Government on April 4, 1903, to erect a hospital building at Chickamauga Park, Georgia. The contract provided that work should commence on or before April 6, 1903, and should be carried forward with reasonable dispatch and be completed on or before January 1, 1904. The contract was by its terms subject to the approval of the Quartermaster-General of the Army, and was not approved by him until April 23, 1903, twenty-two days after the claimant had obligated himself to begin the work. It contained a provision for liquidated damages at $20 a day for each and every day the work might remain uncompleted after the date fixed for completion, January 1, 1904. Before the expiration of the period within which to perform his part of the contract the contractor applied to the Quartermaster-General to waive the time limit. The Quartermaster-General did so. The

building was completed and accepted by the Government on August 31, 1904, and the balance due the contractor was paid without any deduction.

Thereafter a question was raised by the auditor for the War Department in the settlement of the accounts of the officer who made the payments as to whether there should not have been deducted from the contract price the amount of liquidated damages, $4,860.

Thereupon the officer requested the contractor to return the amount, $4,860, which was done upon the understanding that it was for the protection of the officer and should not prejudice the contractor's rights. It was held by the Court of Claims that the claimant recover. The case turned largely, it is true, upon the fact that the Quartermaster-General did not approve the contract until after the time for the beginning of the work by the contractor. It is impossible to read the case, however, without being impressed with the conviction that even had this element not been in the case, the judgment would have been the same.

Ittner v. U. S., 43 C. Cl., 336.

II

The waiver of the time limit in the first contract necessarily tolls the provision in that contract for liquidated damages.

Nothing is clearer in the law than that there must be a definite time from which the liquidated damages begin to run and also a definite time at which they cease. Necessarily, if the time from which the liquidated damages are to run be eliminated from the contract, then no liquidated damages can run from that date.

There are many cases in the books where the waiver of the time limit or the extension of the time in which to complete have been by implication, but the case here is much stronger because here we have the actual deliberate waiver of the Government. As the contract now stands, it is just as if it had been drawn without any time whatever from which liquidated damages were to run. There being no definite time from which liquidated damages are to run, it must follow as a logical necessity that the liquidated damages can not be assessed. That the Government recognized this is abundantly shown by the fact that when the vessel was accepted the entire contract price was paid therefor, even including the 10 per cent which the Government held for 60 days to make good any defects in the material or workmanship.

Kemp v. Rose, 1 Giff., 258.

Dodd v. Churton, 1 Q. B., 562.

"When the stipulation as to the time has been waived, it is eliminated from the contract and therefore relieves the contractor from stipulated liquidated damages for non-completion within the time specified. The waiver established, the contractor may then have an action for the contract price, including the percentage retained as liquidated damages for non-performance within the stated time, and the owner must show any injury he has suffered if he will retain damages out of what is due the contractor or recoup them from what he has paid."

Wait's Engineering and Architectural Jurisprudence, Sec. 726, pages 667, 668.
Flynn v. Des Moines R. R. Co., 63 Iowa, 491.
Phillips v. Seymour, 91 U. S., 646.

In the opinion of the court below it is conceded, citing District of Columbia v. Camden Iron Works, Williams v. Bank, *supra*, the United Engineering and Contracting Company case, 47 C. Cls., 489, lately affirmed by this Court, No. 381, October Term, 1913, Mosler Safe Co. v. Maiden Lane S. D. Co., 199 New York, 479, 489, and cases therein cited, that where the waiver of the time limit is due to the delay of the Government the effect of such waiver is to eliminate the time limit from the contract and also to waive the provision for liquidated damages. If this is true in the case of an implied waiver, *a fortiori*, it is true in the case of an actual waiver. We submit, however, that the real question is whether there is or is not a waiver, and not its form, or how it may have been caused.

III

Aside from the express waiver of the time limit by the Quartermaster-General, the fact of payment in full of the entire balance due under the first contract was an accord and satisfaction and conclusive on the Government and a waiver of any claims against the claimant under that contract.

U. S. v. Corliss Steam Engine Co., 91 U. S., 321.

Same v. Same, 10 C. Cl., 494.

Shipman v. U. S., 18 C. Cl., 138.

I Hudson on Building Contracts, 538.

Wait, *supra*, sec. 325, pp. 269, 270, and cases there cited.

IV

The payment of the entire contract price under the first contract, without any deduction, was deliberate and under no mistake.

The answer and plea of setoff aver that the payment of the whole sum under the first contract was made under a mistake of fact. Inasmuch as the facts constituting the mistake or the facts upon which the mental attitude of mistake may be based are not set out, just what this defense means is not clear. The burden of proof is on the defendant to show what the mistake was. As a matter of fact, not only is there no evidence of any mistake on the part of the Government, but the facts show great deliberation in its conduct. The Quartermaster-General waives the time limit and subsequently confirms it in writing. He advises the depot quartermaster to make the final payments, and the money is paid. How can it be said that there is a mistake of fact here?

To authorize relief on the ground of mistake, the mistake must have arisen from ignorance, imposition or misplaced confidence. An act done intentionally and with knowledge can not be treated as a mistake.

Griffith v. U. S., 22 C. Cl., 165.

There was no mistake of fact. If there was any mistake, it was a mistake of judgment, which can not be reviewed here.

In the opinion of the court below it seems to be assumed that the payment was made under a mistake of law, and cites the case of Barnes v. District of Columbia in which it was distinctly held that "money paid can be recovered back when paid in mistake of *fact* but not of *law*."

Barnes v. D. C., 22 C. Cl., 366, 394.

There is absolutely nothing in the record to show mistake of any kind in the payment. In the fifth finding of fact the Court finds that the Government sets up by way of counterclaim the sum of $4,750 which it *claims* was due as liquidated damages for the 95 days' delay of the claimant in the execution of the first contract hereinbefore referred to, which sum it is claimed was inadvertently, improperly and illegally paid by the officers of the Government to the claimant and the defendant asks that if any amount is recovered by the claimant under said second contract the amount of said sum should be set off against the same.

This finding merely states the *claim* of the Government, as to which there was absolutely no evidence.

The word "illegally" rather suggests that some effort may be made here to show that the Quartermaster-General was without authority to direct this payment to be made. As to that we presume it sufficient to call the attention of the Court to the fact that the contract under which this deduction is sought to be made for liquidated damages was made with the Quartermaster-General's Department of the Army.

The contract was subject to the approval of the Quartermaster-General and was by him approved. Indeed, he was the only officer who could waive the time limit or extend the time. This is the general practice of the Government, and the right is reserved in the contracts.

In the case of Salomon v. U. S., *supra*, the contract was made with the Quartermaster-General's Department. The acceptance was by the Chief Quartermaster's clerk and the Chief Quartermaster gave to Salomon the usual voucher for the sum due.

In the case of Ford v. U. S., *supra*, time specified for the completion of the work was extended by the Chief of Engineers, the contract in that case being made with his Department. So, in the case of Ittner v. U. S., *supra*, which involved a contract with the Quartermaster-General's Department, as in the case at bar, the contract had to be approved by him. The Quartermaster, there as here, waived the time limit. The work required by the contract was completed and accepted by the Government and the contractor was paid in full. So, in the case of the contract for the suction dredge, the contract here sued on, that being made with the Engineers' Department, the Chief of Engineers would be the proper one to extend or waive the time of performance.

In these cases as in the case at bar, the waivers were made, of course, before any liquidated damages had accrued, so that no right of the Government was relinquished.

V

There was no loss or damage suffered by the Government in completing and delivering the steamer under the first contract.

The burden is on the Government to show ~~the amount of the~~ loss or damage sustained by reason of the delay in completing and delivering the steamer, and there is not a scintilla of evidence, even remotely tending to establish such loss or damage. The finding of the Court of Claims on this point is: "It is not shown that the United States suffered any actual pecuniary loss or damage by reason of the delay of the claimants in the completion and delivery of the steamer." Finding VI.

On this point we desire respectfully to call the attention of the Court to the form of the contract under which it is sought to deduct the amount herein involved as liquidated damages. In the answer of the defendants this portion of that contract is set out verbatim. Article 2. "That the Maryland Steel Company shall complete the construction and equipment of said steamer and deliver the same to the party of the first part in New York harbor, or as directed by him, in one hundred and forty (140) days, exclusive of Sundays and holidays, from the date of this contract. And it is hereby agreed that in case the party of the second part fails to complete in all respects and deliver the said steamer within the time herein specified, *the loss resulting to the United States from such failure is hereby fixed at the rate of fifty ($50)*

dollars per day for each and every day, exclusive of Sundays and legal holidays, completion and delivery of the steamer is delayed beyond the period hereinbefore specified, and it is hereby stipulated that the party of the first part may withhold such amount as liquidated damages from any money due and payable to the party of the second part by the United States for work done under this contract." (R., 81-82.)

The language of the contract is that the loss resulting to the United States shall be compensated for at a certain rate. The contract does not contain an agreement, however, that there shall be a loss. The parties do not admit that mere delay must necessarily involve loss. This contract is quite different from that of the suction dredge, in which the language is, "* * * time shall be considered as an essential feature of this contract, and that in case of the failure upon the part of the party of the second part to complete this contract within the time as specified and agreed upon that the party of the first part *will be damaged thereby*, and the amount of said damages being difficult, if not impossible of definite ascertainment and proof, it is hereby agreed that the amount of said damages shall be estimated, agreed upon, liquidated and fixed in advance * * *" (R., 6.)

The essential difference between the two contracts is that in the case of suction dredge the parties themselves agree in advance that mere delay *shall involve a loss*, while on the other hand the contract for the building of the steamer the language is, "the loss re-

sulting to the United States," that is, loss, if any, by reason of delay shall be compensated as provided. The burden of proof under the contract for the steamer is clearly on the Government to show that there was some loss sustained to which the scale of compensation might be applied. It is not, of course, to be pretended that the amount of loss shall be shown, for that is covered by the contractual provision, but it is absolutely necessary that some loss shall be affirmatively shown in order to apply the agreed compensation thereto. A case on this very point was Hathaway v. Lynn. There the plaintiff was the proprietor of a hotel and an omnibus line for the carriage of passengers between the hotel and the cities of Grand Rapids and Centralia. The cities are separated by the Wisconsin River and were at that time connected by a free bridge across the river. At the time the defendant was engaged in the business of operating omnibuses in those cities. The plaintiff sold his omnibus outfit to the defendant who paid the consideration therefor. The defendant then agreed to run a separate omnibus between the hotel and the railroad stations in the two cities, and the plaintiff agreed that so long as the contract was carried out not to put an omnibus line in those cities. In case of the violation of the agreement by either party the damages recoverable by the other party were fixed by the contract.

The action was brought to recover the damages so fixed as liquidated damages for breach of the contract, the defendant having failed to operate the om-

nibuses as provided. The defendant alleged full performance of the contract, except when he had been prevented by the destruction of the bridge between the two cities. He also set up that the plaintiff had released him from the agreement. Verdict and judgment for the defendant. The plaintiff appealed to the Supreme Court of Wisconsin. Said that Court:

> "This action is brought upon the theory that the sum of $200 specified in the agreement is liquidated damages for any breach of the requirements thereof, and such is the contention of the plaintiff. For the purpose of the case the correctness of this proposition will be conceded. In such a case before any liability to pay the liquidated damages can attach to the party in default, he must have been guilty of a substantial breach of his agreement—a breach which has resulted in something more than mere nominal damages to the other contracting party. This rule is so manifestly just that no discussion of it is necessary. Hence, we conclude that the plaintiff is not entitled to recover such stipulated damages for any alleged breach occurring before the time the defendant claims to have been released by the plaintiff from the obligations of the agreement."
>
> Hathaway v. Lynn, 75 Wis., 186.

Before liability to pay liquidated damages can attach the party at fault must have been guilty of a substantial breach of his agreement, which has resulted in something more than mere nominal damages, that is actual loss to the other party.

Werner v. Finley, 129 S. W. (Mo.), 73.

There are cases which appear to establish a different rule, but an examination of those cases will show that they really are in harmony with the rule above cited. Take for instance an action on a bond. There it is, of course, not necessary to prove actual loss because of the nature of the contract. The agreement to pay the obligee the penalty is a primary contract. The obligor must pay the penalty unless the condition be performed. In other words, in those cases there is the very admission which is made in a contract where the parties agree that there shall be a loss by reason of delay.

The fundamental principle of the doctrine of damages is compensation. The loss to be compensated must be established in some way, either by the agreement of the parties or by proof. If there is no loss or damage sustained then the so-called liquidated damages are mere penalties.

VI.

In conclusion we respectfully submit that the judgment appealed from should be reversed and the cause remanded with directions to enter judgment for the claimant for the full amount claimed in the petition.

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We desire to call the attention of the Court to the decisions cited by the appellees. Their brief is divided into three points, and we shall follow that arrangement.

I

The first point is that where a contract provides for the payment of liquidated damages, the same be-

come chargeable without a showing of actual damages suffered. This may or may not be true, depending entirely upon the form of the contract in which the liquidated damages are provided.

The appellees cite in support of this proposition, one case, United States v. Bethlehem Steel Company, 205 U. S., 105, which in turn cites the case of the Sun Printing & Publishing Association v. Moore, 183 U. S., 642. In the case of the Bethlehem Steel Company, the contract was peculiar. The facts are more fully set out in the report of the Court of Claims (41 C. Cl., 19) than in the report of this Court. In March, 1898, just before the Spanish-American war, an in anticipation thereof, the Government, through the War Department, advertised for sealed proposals for the construction of six disappearing gun carriages for 12-inch breech-loading rifles; the specifications accompanying the advertisement set forth the character and extent of the work to be done. The Bethlehem Steel Company, in consequence of a letter written the company by the Chief of Ordnance, in which he suggested that bids be submitted for rapid delivery of a certain number of carriages, and for less rapid delivery, made four proposals, as follows:

1st—To furnish 5 or more such carriages for $31,000.00 each, and to deliver the first carriage within six months, to be followed by two carriages every three months thereafter.

2nd—To furnish the same number for $33,000.00 each, and to deliver the first carriage within five months, to be followed at the rate of one carriage every month.

3rd—To furnish the same number for $35,000.00 each, delivering the first carriage within four months, the second within five months, and the remainder to follow at the rate of three carriages every two months.

4th—To furnish the same number for $36,000.00 each, delivering the first carriage within four months, the second within five months, and the remainder to follow at the rate of two carriages every month.

The Government accepted the 4th proposal, which was slightly modified but not so as to affect the question we are considering. The Ordnance Department sent the company a contract for execution. The company noted that the penalty in the proposed contract was $75.00 for every day's delay in furnishing each carriage, whereas $10.00 had been stipulated in the instructions to bidders. The Chief of Ordnance thereupon replied that the sum of $75.00 was "the average difference in time of delivery between your [the company's] price recently bid for slow delivery of these carriages and the price under the accepted bid." Thereafter it was found that an error had been made in the above computation in that the $75.00 provided for should have been $35.00. The contract, with this correction, was then signed. It is, of course, perfectly obvious that the value of the gun carriages remained a constant factor. The Government, however, was to pay a larger sum for a quick delivery than for a slow delivery. At that time war was impending, and was shortly afterwards declared. The provisions for liquidated damages, however, as stated by the Chief of Ordnance, in the let-

ter to the Steel Company, amounted to computing the gain or loss to the Government, by rapid or slow deliveries, as the case might be, in the form of liquidated damages. In accepting the 4th proposal, what the Government really did was to say to the Steel Company, "we shall pay you $36,000.00 apiece for the carriages if delivered, the first within four months, the second within five months, and the remainder at the rate of two carriages every month." In other words, we shall pay a series of bonuses for quick delivery.

There was considerable delay in furnishing the carriages, and the Government withheld the stipulated damages. Under these circumstances this Court sustained the Government. The whole case turned upon the proposition that the Government was paying so much additional money to the Steel Company, not merely for gun carriages, which might have been purchased at a reduced figure, but for the purpose of securing early delivery, and inasmuch as that part of the contract had not been performed, the Steel Company had not earned the stipulated amount which was to be paid to it in consideration of early delivery. In other words, the Steel Company was to earn a bonus, to put the proposition in a more usual form, and by reason of its delay it failed to earn the bonus, and, therefore, the Government refused to pay it. This is precisely the ground taken by the Attorney-General in his brief in that case.

The opinion of the Court, reversing the Court of Claims, speaks of the courts being "strongly in-

clined to allow the parties to make their own contracts and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained."

Unquestionably, the parties in the case at bar might have made another agreement, a contract such as, for instance, they did make in the case of the suction dredge, which would have provided for liquidated damages, and which might have been carried into effect, but they did not do that. The vital distinction between the contracts of the Bethlehem Steel Company and of the Maryland Steel Company for the suction dredge, on the one hand, and the contract of the Maryland Steel Company for the construction of the steamer on the other, results from the contracts which the parties themselves have made. In the case of the steamer they might have made another contract, but they did not do it.

The Bethlehem Steel Company case cites the Sun Printing & Publishing Association v. Moore, *supra*, a case which illustrates the very rule for which we are contending. In that case a yacht, the property of Moore, was let by a charter party to the Sun Printing & Publishing Association, for a definite period, at the end of which she was to be returned. The vessel was wrecked and became a total loss. It was agreed that for the purpose of the charter that the value of the yacht should be considered and taken at $75,000.00, and that the hirer should procure security to the owner to that amount. The loss was

admitted. The case was as to the quantum of damages, whether the agreed valuation should be applied, or, as contended by the Sun Printing & Publishing Association, the actual value of the vessel. The court applied the valuation of the yacht as agreed by the parties. In that case the very cause of action arose from the failure of the hirer to return the yacht to the owner within the time stipulated. The loss, which was the damage to which the agreed scale of compensation was to be applied, was admitted.

II

The second point of the appellee's brief is to the effect that the waiver of the time limit for the performance of the contract did not destroy the right to liquidated damages. Nothing is set out as to how it is possible to assess liquidated damages without a definite starting point. The brief then goes on to cite eight cases, not one of which is a case in any way involving the doctrine of liquidated damages. They are all cases where actual damages are the causes of action.

We do not mean to say, of course, where the stipulation as to time has been waived and has been eliminated from the contract, or where a contract is drawn which makes no provision at all for liquidated damages, that in these cases the parties charged with the construction may unreasonably delay the work to such an extent as to damage the other party to the contract and not be liable for actual damages. But

we do say just what this Court said in the case of Phillips v. Seymour, 91 U. S., 646; that in such a case there may be a recovery for actual damages, or the party may wait to be sued and recoup the damages thus sustained, in reduction of the contract sum for the completion of the work. The waiver of the time limit left the contract without any time limit, but it was none the less to be performed within a reasonable time, and if not so performed, any damages which the other party might have sustained by reason of the delay might be the basis of an action for damages.

We have carefully examined every case cited by the appellees under this point, and in not one of them in any way did the contract provide for liquidated damages. In the case of the Phillips v. Seymour, *supra,* there was a provision that a certain amount of money might be withheld to meet any damages which the other party might sustain, but there was no provision for the amount of those damages, no liquidated or stipulated damages.

III

The appellees concede that the Quartermaster-General had the right to make the contract and the waiver and to accept the steamer when completed, but they say the payment under the contract was illegal or under a mistake. They nowhere set out, however, in what the payment was unlawful or mistaken. They admit that he had a right to make the contract as modified by the waiver and to take the

benefits thereunder, but they deny that he could discharge the correlative obligation.

Respectfully submitted,

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WALTER D. DAVIDGE,
Attorneys for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

MARYLAND STEEL COMPANY OF BALTIMORE COUNTY, appellant,
v.
THE UNITED STATES.

No. 104.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal on the part of the Maryland Steel Company from a judgment rendered by the Court of Claims in favor of the Government.

On June 24, 1903, appellant entered into a contract with the Government to construct a single-screw steamer at a cost of $88,000, to be completed on December 9, 1903. The terms of the contract provided that if the appellant should fail to complete and deliver said steamer within the stipulated time it should pay the United States the sum of $50

per day as liquidated damages for each and every day so delayed, exclusive of Sundays and legal holidays, which amount might be withheld from any money due appellant under said contract.

On December 1, 1903, or nine days before the stipulated time of completion, the ~~depot~~ quartermaster, United States Army, at the request of appellant, orally waived the time limit for constructing and equipping said steamer, and subsequently confirmed said waiver by letter of April 2, 1904. The steamer was completed, delivered, and accepted by the United States on April 1, 1904, and on July 13, 1904, the balance in full of moneys retained to cover defects in material and workmanship was paid to appellant.

On February 24, 1908, appellant entered into another contract with the Government, whereby the former agreed to construct a twin-screw suction dredge at the contract price of $357,500, and the same was delivered to and accepted by the United States on January 6, 1909. Appellant was paid the stipulated contract price, less $4,750, which the Government claimed as liquidated damages accruing from the 95 days' delay of appellant in the first contract hereinbefore referred to, for which amount appellant brings this action.

The Government pleaded (Rec., 81) a set-off by way of counterclaim in the said sum of $4,750 claimed as liquidated damages for the 95 days' delay growing out of the first contract, which it

claimed was inadvertently and by mistake paid by the officers of the United States Government.

Appellant contends that the waiver of the stipulated time limit under the terms of the contract had the effect of waiving the rights of the Government to liquidated damages. Appellant further contends that the payment in full of the contract price under the first contract was an accord and satisfaction and conclusive on the Government, and the waiver of any claims against the claimant under the contract; that there was no mistake of fact on the part of the depot quartermaster in making the payments; that the burden is on the Government to show some loss or damage, and that there having been no loss or damage suffered, the Government had no right to withhold the sum claimed for liquidated damages.

The Government, on the other hand, maintains that the waiver of the time limit for completion, having been granted because of the admitted inability of appellant to complete the contract within the stipulated time, and at the request of appellant (Rec., p. 89), did not destroy the effect of the liquidated damage clause (article 2, Rec., p. 86); that where the contract provides for liquidated damages it is not necessary to prove actual loss or damage sustained; that the Government is not bound by the acts of its officers in making unauthorized payments inadvertently or by mistake.

ARGUMENT.

The Government presents its argument under the following heads:

First. Where the contract provides for the payment of liquidated damages the same become chargeable without a showing of actual damage suffered.

Second. The waiver of the stipulated time limit for the performance of the contract did not destroy the right to liquidated damages.

Third. The Government is not bound by the acts of its officers in making unauthorized payments.

I.

Where the contract provides for the payment of liquidated damages the same become chargeable without a showing of actual damage suffered.

Article 2 of the liquidated damage clause is as follows:

> That the Maryland Steel Company shall complete the construction and equipment of the said steamer and deliver same to the party of the first part in New York Harbor, or as directed by him, in one hundred forty (140) days, exclusive of Sundays and legal holidays, from the date of this contract. *And it is hereby agreed that in case the party of the second part fails to complete in all respects and deliver the said steamer within the time herein specified, the loss resulting to the United States from such failure is*

> *hereby fixed at the rate of fifty ($50) dollars per day for each and every day, exclusive of Sundays and legal holidays, completion and delivery of the vessel is delayed beyond the period hereinbefore specified, and it is hereby stipulated that the party of the first part may withhold such amount as liquidated damages from any money due and payable to the party of the second part by the United States for work done under this contract.* In the event of the act of God, war, fire, or strikes and lockouts of workmen affecting the working of this contract, the date of completion of the steamer may be extended for such periods as may be deemed just and reasonable by the party of the first part, to cover the time lost from any of the above-mentioned causes.

This court has held that where there is no fraud or other illegality to vitiate the agreement, the terms of the contract for liquidated damages remain in force, regardless of whether there has been any actual loss or damage occasioned by the delay.

In the case of *United States* v. *Bethlehem Steel Company* (205 U. S., 105, 119) the court said:

> The courts at one time seemed to be quite strong in their views and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the party aggrieved could

> be recovered. Subsequently the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts and to carry out their intentions even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained. This whole subject is reviewed in *Sun Printing & Publishing Association* v. *Moore,* 183 U. S., 642, 669, where a large number of authorities upon this subject are referred to.

It is assumed and declared by the appellant that there were no damages suffered by the Government because of the delay. Aside from the fact that it is not incumbent upon the Government to prove a loss, nevertheless it is not shown that loss did not actually occur. The language of finding 6 (Rec., 85) regarding it is as follows:

> It is not shown that the United States suffered any actual pecuniary loss or damage by reason of the delay of the claimant in the completion and delivery of the steamer.

The Government did not attempt to show loss. Under the authorities such showing is not necessary. However, it is a fair presumption that the loss of the use of the vessel for 95 days was a serious damage, though not susceptible of ascertainment in dollars and cents.

II.

The waiver of the stipulated time limit for the performance of the contract did not destroy the right to liquidated damages.

Appellant contends that the extension of the time limit waived the liquidated damages agreed upon because there was then no fixed date from which liquidated damages could commence or cease to accrue.

The Government maintains that the waiving of the time limit simply estopped the Government from annulling the contract, but that this in no way affected the other terms of the contract.

In the case of *Phillips* v. *Seymour* (91 U. S., 646, 651) the court said:

> If the builder has done a large and valuable part of the work, but yet has failed to complete the whole or any specific part of the building or structure within the time limited by his covenant, the other party, when that time arrives, has the option of abandoning the contract for such failure, or of permitting the party in default to go on. If he abandons the contract, and notifies the other party, the failing contractor can not recover on the covenant, because he can not make or prove the necessary allegation of performance on his own part. What remedy he may have in assumpsit for work and labor done, materials furnished, &c., we need not inquire here; but if the other party

> says to him, "I prefer you should finish your work," or should impliedly say so by standing by and permitting it to be done, then he so far waives absolute performance as to consent to be liable on his covenant for the contract price of the work when completed.
>
> For the injury done to him by the broken covenant of the other side, he may recover in a suit on the contract to perform within time; or, if he wait to be sued, he may recoup the damages thus sustained in reduction of the sum due by contract price for the completed work.

In the case of *McGowan* v. *American Pressed Tan Bark Company* (121 U. S., 575, 600, 601) the facts show that the defendants were to erect machinery on plaintiff's steamboat in 60 days from the date of the contract. The plaintiff failed to finish the steamboat until after the expiration of the 60 days. The defendants then went to work to put in the machinery, but failed to complete their work within 60 days after taking possession of the boat. It was held they were bound to do their work within 60 days from the time the boat was finished and that the waiver of the time limit for completion did not waive the right of the plaintiff to recover damages for the delay on the part of the defendants who failed to complete within 60 days after the completion of the boat. Mr. Justice Blatchford, writing the opinion, said, on page 600:

> It is, therefore, claimed by the plaintiff that no damages were included in the verdict

on account of the delay in not erecting the machinery within sixty days from June 23, 1881. This appears to be a sound proposition. We see no error in the charge of the court that if the defendants proceeded under the contract they were bound to complete the work within the length of time contemplated by the original agreement and such additional time as was lost by the delay in the construction of the boat. There is nothing in the bill of exceptions to show that the machinery could not have been erected within sixty days after the boat was ready to receive it. The parties treated the contract as in full force, except as to the time in which it was to be performed, and the work was done and the payments were made under the contract as thus extended in time. The defendants made no claim before the suit was brought that the contract was rescinded by reason of the nonreadiness of the boat until the 10th of November, 1881, or that there was any reason in that fact which prevented them from complying with their part of the contract within the sixty days after the delivery of the boat. No such defense is set up by them in their answer, and they introduced no evidence to that effect, so far as the bill of exceptions shows. These views are in accordance with the ruling of this court in *Phillips Co.* v. *Seymour*, 91 U. S., 646. The plaintiff went on paying the defendants on accounts for the machinery, and the defendants proceeded in erecting it without com-

> plaining of the delay in the furnishing of the boat, and without any claim that they were not required to furnish the machinery within the sixty days after the furnishing of the boat. See also *Graveson* v. *Tobey*, 75 Ill., 450.

See, also, *United States* v. *McMullen* (222 U. S., 460, 468–471).

In the case of *Nibbe* v. *Brauhn* (24 Ill., 268, 270) it was held that—

> A precise time, then, is shown, within which the contract was to be completed. That parties, while work is in progress, may extend the time for its completion, can not be questioned. Owing to the alterations demanded by appellant, further time became necessary for the completion of the building, and it was extended by agreement, to the first day of September, 1857, at which time it was completed and accepted by the appellant, and, therefore, the contract was as fully performed as though it had been finished on the first day of June. We would hold, that appellant having permitted the contractors to proceed on the work after the first day of June, and accepting the work at a future day has waived the performance on the day fixed, and that a mere extension of time of performance does away with none of the stipulations—an agreement to extend the time waives nothing more than the time of performance.

In the case of *Redlands Orange Growers' Association* v. *Gorman* (54 L. R. A., 718, 721; 161 Mo., 203) the court said:

> The position of the appellant is that, when goods are delivered out of time, and the vendee accepts them without protest, he thereby waives his right to damages resulting from the breach of the contract, except where the goods are accepted of necessity; that is, where the surrounding circumstances are such as to make it necessary for him to accept in order to avoid the accummlation of much greater damage. We can not accede to this view of the law. We believe the law to be that, where time is made the essence of the contract, delay beyond the stipulated time in the shipment or delivery of goods does not preclude the vendee from accepting them. If he does so, and is damaged on account of the delay, and he has paid the purchase money, he may bring this action, and recover his damage. If he has not so paid, he may recoup his damage when sued for the purchase price.

In the case of *Fisk* v. *Tank* (12 Wis., 306, 78 Am. Dec., 737) the court said:

> We were at first in doubt whether the plaintiff's claim for board and wages of seamen should not be confined to such time as was lost after the machinery was delivered and up to and including a reasonable time for supplying other, on the ground of his right, upon the failure of the defendants to furnish it on the 1st of August, to consider

> the contract at an end and to proceed to supply himself elsewhere, and because his waiver of performance as to time might be considered an abandonment of any claim for damages on that account. But on further consideration we are satisfied this would be wrong. A waiver in such cases is made for the benefit of the party in default, and as against him should be construed strictly and liberally in favor of the party making it. It is supposed to be granted at the request of the party indulged, and should be confined to the precise right waived (which in this case was the right to refuse the machinery after the day) and should not be extended to collateral matters. In this case there can be little doubt that the plaintiff was deterred from making exertions to procure other machinery by the conduct and assurances of the defendant Verbeck, that that contracted for would be speedily completed.

See also *Jeffrey Mfg. Co.* v. *Central Coal & Iron Co.*, 93 Fed., 408, 412.

The cases most relied upon by appellant (in the court below) have been reviewed and distinguished by the court in its opinion. (Rec., pp. 88–89.)

III.

The Government is not bound by the acts of its officers in making unauthorized payments.

This court has so repeatedly held that the Government is not bound by the acts of its officers in making unauthorized payments through mistake of

facts or of law that we do not deem it necessary to do more than call attention to the doctrine laid down in the following cases:

Wisconsin Central Railroad Co. v. *United States,* 164 U. S., 190, 212.

Logan Company v. *United States,* 169 U. S., 259.

United States v. *Saunders,* 79 Fed., 408.

United States v. *Utz,* 80 Fed., 852.

Respectfully submitted,

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